FILE COPY

FILED
JUN 7 - 1949
SUPREME COURT OF THE UNITED STATES
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 105

THE UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

HUDSON TRANSIT LINES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM AND STATEMENT OPPOSING JURISDICTION

SAMUEL WEISS,
JAMES F. X. O'BRIEN,
Counsel for Appellee.

POOR COPY

BLEED THROUGH

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil No. 44-326

HUDSON TRANSIT LINES, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET ALS.,
Defendants

MOTION TO AFFIRM

To Messrs. Herbert A. Bergson, Assistant Attorney General, and
Edward Dumbauld, Special Assistant to the Attorney General, Attorneys for the Defendant-Appellant, United States of America, and
To Messrs. Daniel W. Knowlton, Chief Counsel, and
Daniel H. Kunkel, Attorney for Defendant-Appellant, Interstate Commerce Commission.

SIRS:—

Please take notice that the plaintiff-appellee, Hudson Transit Lines, Inc., does, pursuant to Rule 12, Paragraph 3, and pursuant to Rule 7, Paragraph 4, move to affirm the order and decree of the District Court in the above entitled

cause upon the grounds that the questions involved in the appeal to the Supreme Court of the United States are so unsubstantial as not to need further argument, and that the Statement as to Jurisdiction filed by the appellants does not disclose any adequate statement of grounds indicating that the questions involved are substantial as required by Rule 12, Paragraph 1. In this motion, we shall rely upon the Statement Against Jurisdiction annexed hereto and filed herewith.

Dated: May 5th, 1949.

Yours very truly,

SAMUEL WEISS.

SAMUEL WEISS,
Attorney for Plaintiff-Appellee,
Hudson Transit Lines, Inc.,
535 Fifth Avenue,
Borough of Manhattan,
City of New York, N. Y.;

and

JAMES F. X. O'BRIEN,
Attorney for and of Counsel
with Plaintiff-Appellee,
Hudson Transit Lines, Inc.,
17 Academy Street,
Newark 2, New Jersey.

POOR COPY

BLEED THROUGH

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 44-326

HUDSON TRANSIT LINES, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.,
Defendants

STATEMENT AGAINST JURISDICTION

Pursuant to Rule 12, Paragraph 3 of the Supreme Court Rules, Hudson Transit Lines, Inc., plaintiff-appellee herein, presents this Statement Against Jurisdiction, and respectfully submits that the questions involved in the instant appeal to the United States Supreme Court are so unsubstantial as not to need further argument.

Statement of Facts and Issue Involved

An appeal was taken by the defendant-appellant, Adirondack Transit Lines, Inc., in this cause, and the plaintiff-appellee, which makes the instant motion to affirm, filed a

motion to affirm and a statement against jurisdiction directed against the appeal filed by Adirondack Transit Lines, Inc. Much of the matter alleged in that motion and statement constitutes the basis for the instant motion to affirm and statement against jurisdiction. We do not wish to burden the Court with duplication of reading, and shall endeavor not to repeat in this statement against jurisdiction the bulk of that contained in the one previously filed by us in this cause, inasmuch as the Court will undoubtedly have occasion to read the previous motion and statement before coming to consideration of the instant one.

While the basic attack upon the opinion and decree of the Court below is the same in the instant appeal as in the Adirondack appeal, we feel constrained to answer certain errors and misconceptions in the assignment of errors and statement as to jurisdiction contained in the instant appeal and not in the Adirondack appeal.

To one familiar with the record and the determination of the Court below, the contents of the assignment of errors and statement as to jurisdiction would seem to refer to another case altogether. The Court below is charged with holding what it never held, and the real issues are so camouflaged as to be hardly recognized. The Court never took the position alleged in assignment of error No. 3, nor 4, nor 5, and in its interpretation of Section 207(a) of the Interstate Commerce Act, Part II, it merely repeated the interpretation constantly reiterated by the Interstate Commerce Commission itself in innumerable decisions from the time that Act was passed, up to and including the present time, and which had been the interpretation of the pertinent words in similar statutes, and in both Federal and State jurisdictions for many, many years past.

POOR COPY

BLEED THROUGH

Likewise, the allegation of error to the Court because it examined the only possible pertinent bit of evidence touching upon necessity and convenience, and found that it did not meet the standards of substantial evidence, is a twisting of what happened because the Court did not weigh conflicting evidence nor indeed, in the true sense, even weigh the evidence. The Court merely complied with its obligation to examine the evidence in the record to see if there was substantial evidence which could support a Commission finding of need. This is an obligation of the Court, and to that extent involved a mental process which might be considered a weighing or considering of the evidence, but only as the Court made clear to that limited extent, to wit, to determine whether there was substantial evidence in support of a finding. Errors 7 to 10 inclusive are included in the above.

The real crux of appellants' complaint appears in errors 11 and 12, one of which just objects to the decree at all without comment, and the other because the Court failed to permit the Commission to make an order which was not supported by substantial evidence, and indeed which was not supported by findings required by law. In essence, appellants take the position that there is not any such thing as an appeal to the Court because whatever the Commission does is justified by saying that it acted within its discretion. In this respect, appellants are merely repeating what they told the Court below, to wit, that the Commission is a law unto itself, and is not accountable to the Courts, and that the Courts in effect have no right to question any action of the Commission irrespective of the evidence, the record, or the findings, because the Commission has unlimited discretion. This contention is so utterly at variance with established law and the many determinations of this Court that to again review it would be to waste

the court's time, and the money and time of the litigants involved.

In the Statement as to Jurisdiction, appellants cite many cases as allegedly in support of their position. All of these cases were analyzed in the argument before the Court below with the exception of a few very recent rulings, more particularly—

Beard-Laney, Inc. v. *United States,* Eastern District, South Carolina, decided February 7, 1949.

A careful reading and analysis of these cases, as presented to the Court below, and as can be here found by reference thereto, shows they do not support the position taken by appellants. Appellants cannot quote a sentence or a paragraph from one case, and another from another, and tie them together in an endeavor to mean what the Court never intended them to mean. Excerpts can be very misleading, and they have been so presented by appellants in this case.

At Pages 2 and 3 of the statement, appellants point out that a finding of need was made in a portion of the territory Adirondack sought to serve in the final order of the Commission, which changed its prior order. It fails in this respect to point out that on the identical type of evidence, the Commission thus applied one standard to the carriers south of a certain intersection, and another standard of law to the carriers immediately north thereof, despite a record which showed similar conditions existing in both. This type of discrimination was rejected by this Court in *United States* v. *Carolina Freight Carriers Corp.* 315 U. S. 475, where the Court pointed out that there is no statutory warrant for applying to irregular carriers a different or stricter test than that applied to regular route carriers. By the same token, the same tests concerning proof of necessity and convenience apply to all carriers operating along a route or

POOR COPY

BLEED THROUGH

routes, and no artificial line of demarcation can be drawn to emasculate the statute as to an unfavored few.

It is claimed, Sheet 4, that the Commission found the urban mass transportation area in the vicinity of New York City extended no further north than Paramus, New Jersey. This is utterly contrary to the record proof, which has no support for such statement, and indeed the record before the Court below discloses that as to the identical route north of Paramus, and running to Harriman, here involved, the Commission in a decision involving the plaintiff-appellee held that this particular territory was in that area affected by the change to use of Lincoln Tunnel, and therefore in effect within the urban mass transportation area. The only record in the case utterly contradicts the alleged claimed finding which, indeed, is so vague and indefinite as not to constitute a finding in law. On the same page, it is alleged that the buses north of Paramus operated on printed time-tables, with passengers purchasing tickets in many instances before boarding the vehicles, but the record of the case indicates that these identical circumstances existed in the case of the carriers south of that intersection whom the Commission protected. The allegation that the service north of Paramus was found to be long distance, over-the-road service was, as to the authorized carriers and particularly Hudson Transit, directly contrary to the uncontradicted proof which in both exhibit form and testimony form showed without contradiction that plaintiff-appellee ran two types of service thereon, one a long distance over-the-road operation, similar to Adirondack, and the other, a distinct and separate short haul and commuter division, servicing the people in that area. Again, the finding of the Commission is not only unsupported by anything in the record, but utterly contrary to the clear record proof.

Even if the alleged findings had been supported by the evidence, they would not in law have justified the Commission in interpreting necessity and convenience differently as to one set of carriers in comparison to another. Necessity and convenience, while applied under different circumstances, basicly means the same thing, and the Commission cannot ignore the requirements enacted by Congress and discriminate between allegedly different types of operation. As above mentioned, the Supreme Court condemned this attempt in the *Carolina Freight Carriers* case, *supra.*

The allegation, in the middle of Page 4 of the Statement, that the Commission concluded that the imposition of the restriction north of Paramus to Harriman would result in wasteful transportation just has no basis either in the record or even in fact in this appeal. The Court below, by the terms of its order, bent over backwards to protect and help Adirondack, and did not prevent the Commission from authorizing Adirondack to carry passengers in the manner in which it previously had, to wit, incidentally in connection with its long haul, over-the-road service, as distinguished from the order which prevented the Commission from permitting Adirondack a wide open certificate, which would permit it to institute a new competitive service, for which there was no record proof of necessity and convenience, and which the uncontradicted proof showed would be utterly destructive to the service given by plaintiff-appellee and others to the traveling public.

At page 5 of the Statement by appellants, and under the title, *"The Questions Presented Are Substantial,"* an attempt is made to inject issues which are not now and never have been issues in this case.

It is claimed that the Court below made an erroneous interpretation of Section 207 of the Interstate Commerce Act, and in particular erroneously held that there had to be

POOR COPY

BLEED THROUGH

proof in the record and a finding by the Commission with respect to inadequacy of existing carriers *"or their inability to expand or improve their service so as to handle all available business."* Appellants apparently recognize that the Commission in every case where it enunciated an interpretation of Section 207 (a), and the Courts likewise held, that proof of public convenience and necessity under that section entailed proof of a public need unfulfilled by existing facilities, and which could be fulfilled by an applicant without endangering the continued existence and service of present facilities. In order to avoid the above interpretation, made repeatedly by the Commission right to date, appellants attempt to add a new pretended issue, to wit, by inferring that the Court below found that the Commission in determining that there was public convenience and necessity for a new application had to find not only that existing carriers were not adequately serving the public, but that they could not put themselves in a position where they could expand or improve their service to handle the available business. This is a fictitious issue, and an attempt on the part of appellants to charge the Court below with a finding that it never made, and which never appeared any place in this case up to this Statement just filed on this appeal.

It is fundamental that the Commission does not have to go into the question of whether or not existing carriers can fill the public need if they want to, and there is not one word in this entire record to justify any belief that such a contention was ever made in this case. To the contrary, the uncontradicted finding of the Interstate Commerce Commission is that existing facilities in this territory are adequately filling the public need.

No one has contended, and indeed the Court below made that clear in its opinion, that upon proper record proof the Commission could authorize an additional operation in order

to introduce competition which was shown to be in the public interest, and where the benefits of an improved service would result. The Court below commented upon that and said that it was clear that the Commission could do so in a proper case, and that the holder of a certificate is not entitled to immunity under any and all circumstances, but the Court, after a review of the record in this case, pointed out with reference to this contention:—

> "No such finding has been made here, nor is there any evidence to support such a finding."

The numerous cases cited in the Statement of appellants, at page 5, do not support the contention that the Court below erred. An analysis of those cases was made in the argument before the Court below, and what might otherwise have been misleading excerpts from some of them were shown upon an analysis of the entire opinion in each of those cases to be wholly consistent with the contentions made by plaintiff-appellee, and to be wholly consistent with what the Court determined in its opinion herein.

At the bottom of Sheet 5 above mentioned, there is cited the case of *Beard-Laney, Inc.* v. *United States*, (E.D. S. C.) (decided February 7, 1949), which of course was not mentioned in the argument before the Court below because there had not yet been any decision in that case. This case is reported in the April 1, 1949 advance sheet of Federal Carriers Reports, and bears the citation in this unofficial publication of *7 Federal Carriers cases, page 2061.* It is apparently from this case that appellants got the idea of raising the fictitious issue, to wit, that the Commission does not have to make a finding that existing facilities can not expand and improve their service in order to fill a need of the public, and then attempted to infer that such erroneous interpretation of the Act had been made by the Court

POOR COPY

BLEED THROUGH

below in this case. It is true that in the *Beard-Laney* case the statutory court criticizes the opinion of Judge Schwellenbach in the case of *Inland Motor Freight* v. *United States, 60 Federal Supplement 520*, and, apparently because Beard-Laney claimed that under that decision, the Commission had to give it a chance to expand and increase its facilities and take care of the public need instead of letting somebody else in the picture. The Court, in the *Beard-Laney* case, said:—

> "We are not impressed by the argument that, because it is not shown that protestants could not increase their facilities to take care of the need which would arise upon the withdrawal of WECA, there is no basis for granting a certificate to applicant."

We agree with that statement of the court, although we do not agree with the inference that Judge Schwellenbach similarly held in the *Inland Motor Freight* case.

In the *Beard-Laney* case, there were certain carriers having permanent authorized rights, and a carrier having special temporary rights which was withdrawing from the field. The record proof in the case, as clearly shown in the Court's decision, disclosed that the existing facilities permanently certificated did not have the equipment or facilities to fill all of the public need that existed, and which would continue to exist upon the cessation of the temporary authorized operation. Therefore, a situation was presented where there was a clear public need, unfulfilled by existing carriers, and which those carriers could not fulfill in the ordinary course of events. The Court, in the *Beard-Laney* case, was very careful to document its position with excerpts from the Commission's decision, such as—

> "No common carrier service is shown to be available to serve the entire territory in which a definite need

for service is established by shipper witnesses, nor is it shown that existing carriers can absorb the substantial tonnage transported by WECA in the territory involved."

Thus, it is clear that the Court in the *Beard-Laney* case recognized inadequacy of existing facilities to constitute one of the elements making up proof of public convenience and necessity, and supported its determination on that very basis, and found that the record proof in that case substantially supported the Commission's findings and determination. The briefs in the *Beard-Laney* case will indicate that the statutory Court decision in the instant case was considered in argument of counsel, but it was not even cited by the Court because the issues in the cases were entirely different.

There is no conflict in the determination of the statutory court in the instant case with that in the *Beard-Laney* case. The cases are two entirely different cases with totally different sets of facts and involving clearly distinct issues.

It is beyond understanding to us why the Commission's attorneys should question the interpretation of Section 207 (a) as made by Judge Swan in this case because it is the identical interpretation which the Commission has always made of that Section, and which it is still making in interpreting what necessity and convenience means. The very morning that we are dictating this Statement Against Jurisdiction, we received the April 26, 1949 advance sheet containing 7 Federal Carriers Cases, page 104, wherein is reported the Commission decision in the *Application of H. M. Florman, No. MC-F 3496*, and in that case, the very latest available to us of any Commission determination discussing what public convenience and necessity means, the Commission said:—

POOR COPY

BLEED THROUGH

"Need is not synonymous with convenience or benefits, but pre-supposes a requirement not already being adequately met."

We cannot conceive the desire of the attorneys for the Commission to tear down the great body of law made by the Commission interpreting Section 207 (a), and which was adopted from the decision of this Supreme Court, as shown by the Commission's determination in *Pan-American Bus Lines*, 1 M. C. C. 190. It would indeed be a catastrophe if the Commission were to try to destroy a sound and long established interpretation of Section 207 (a) just in order to achieve what is apparently a desired objective in the instant case.

In an endeavor to create an issue which this Court might think meritorious enough to consider, appellants, at Page 7 of their Statement, try to say that the Court below tested the validity not of the final order of the Commission, dated July 8, 1947, but rather the prior decision of July 3, 1946. Again, this is not in accord with the facts. An examination of the decision of the Commission, dated July 8, 1947, to which was annexed the order which caused us to complain to the statutory Court, will disclose that the decisions of the Commission dated July 3, 1946 and July 8, 1947 are one decision, with the latter adopting the prior decision except as certain facts were re-stated. Therefore, the order appealed from was based upon the two decisions, with the latter one amending or correcting certain of the facts, as is clearly disclosed in the third paragraph of the July 8, 1947 decision, which said:—

"Facts set forth in the prior report will be restated only to the extent necessary to the disposal of the issue here presented."

It should be noted in passing that there was never a reversal, or re-statement, or correction of the clear, basic finding made in the July 3, 1946 report that existing facilities were adequately serving the public in the territory in question, and therefore this, not having been re-stated, was adopted as part of the final decision upon which the erroneous Commission order was made.

In the argument below, and in the Court's decision, there was never a question but that the final determination of the Commission is the one which the Court must consider, irrespective or prior or intermediate different determinations. In this case, since the Commission itself had tied the two reports in so that in order to know what they did, it was necessary to read both, the Court of course had to do just that. Examination of the Court's decision will likewise indicate that instead of reciting its findings of fact at length, it merely adopted, in order to shorten its opinion, the factual findings of the Commission in its decision of July 3, 1946, because those findings were supported by substantial evidence, and it rejected the order and determination appealed from because that order did not have substantial evidence supporting it.

It is charged that the Court below evaluated the basic findings of the Commission in the light of the record proof, but that is what the Court has to do in order to determine whether there is substantial evidence in the record to support the findings questioned on appeal. This Court has said that substantial evidence is not a mere scintilla but means relevant proof that a reasonable mind could accept to support a conclusion. In order to apply the very test enunciated by the Supreme Court of the United States, the Court below had to examine the findings and the record evidence. It did not weigh evidence to determine whether in its judgment it proved or did not prove something. It

POOR COPY

BLEED THROUGH

did not weigh conflicting evidence. It merely examined the record.

When the entire record is analyzed, the sum total of all relevant evidence upon which a claim of public necessity and convenience could be made was that evidence indicating that, while Adirondack ran without lawful authorization, it carried between the territory in question and New York City an average of ¾ of one passenger per Adirondack trip, which constituted the equivalent of approximately ⅕ of one passenger per Hudson Transit trip, without, even including trips of either Mountain Transit, Inter-City, or Greyhound. This was not substantial as distinguished from incidental service, which the Supreme Court said was necessary in the case of *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, and it was not evidence which a reasonable mind could accept as adequate to support a finding that there was a public need unfulfilled by existing carriers. Plain common sense would brand that evidence as so unsubstantial as to hardly constitute a scintilla. The Court in so determining was not usurping the function of the Commission in weighing the balance of evidence. It was exercising its prerogative and doing its duty by determining that such evidence could not as a matter of law be deemed adequate to a reasonable mind to support the Commission's conclusion.

Finally, in an endeavor to make claim that there is a substantial issue to be argued in this case, appellants at Sheet 8 of their Statement claim that the Court below acted as if it were the regulatory agency and substituted its judgment for that of the Commission. The basis for this is that the Court signed the decree proposed by the appellants in this case, instead of the decree proposed by plaintiff-appellee. The difference was that in appellants' form of decree it was provided that, although the Commission's order was set

aside and annulled, nevertheless, nothing in the Court's order should be deemed to prevent the Commission, if it so desired, from authorizing Adirondack Transit Lines to carry passengers in the manner in which it had previously done, to wit, between New York and the territory in question incidental to and in connection with its long haul operations, which the uncontradicted proof showed went at least as far as Kingston, New York.

Appellants asked the Court in the decree to at least let Adirondack do what it had done before, and which was the only proof in the case upon which any authority might possibly be predicated in the event that the Commission wanted to so authorize operation. The Court did not substitute its judgment for anybody's judgment. It merely did not prevent the Commission from exercising its judgment in that respect if the Commission so desired. The apparent basis for the Court accepting appellants' form of decree was the incorporated testimony of Adirondack's witness Cassidy, who, in such incorporated testimony, had stated that existing facilities would not be hurt very much if Adirondack merely did what it had always done, to wit, carry a few passengers incidental to service which ran through from New York, at least to Kingston, but that existing facilities would be seriously affected if a certificate were issued which would permit Adirondack to institute short haul and commuter type service, which it had never operated. Thus, the Court went even further than it should have in giving the maximum possible benefit to Adirondack from the evidence of its past carriage by not precluding the Commission from allowing Adirondack to get a certificate which would permit it to continue as it had theretofore operated.

Plaintiff-appellee is the only one who has a right to complain of this because their prior carriage under unlawful operation was of such an unsubstantial, sporadic and inci-

POOR COPY

BLEED THROUGH

dental character as to afford no basis for any finding of any need, when tested by the substantial evidence rule, and particularly in view of the Commission's finding, which it never changed, to wit, that existing facilities were actually adequately filling the public need. The Court did not prescribe what the Commission should or should not allow Adirondack, but on the contrary found from uncontradicted record proof that there was no substantial evidence to justify the kind of an order which the Commission issued, and which found public convenience and necessity for a directly competitive short haul and commuter service, for which the record contained no justification in law.

It is strange indeed that appellants should use as justification for their appeal the entry of a decree which they urged the statutory Court to adopt, and which it did adopt over plaintiff's objections. The statutory Court below went not only as far as it possibly could go on the record, but even further, we believe, in its desire not to override anything that the Commission ordered where there was the slightest semblance of lawful support for that Commission action.

The issues attempted to be raised by all appellants in this case are not and have not really been issues in the proceeding at all, but are attempts to create issues to justify the appeal. The only real issue, when the whole thing be analyzed, is an insistence that the Commission has a right to act as it pleases in any case without its actions being tested by any legal yard-stick, to wit, the statute of Congress as it has been interpreted by the Commission itself and by the Courts. The justification for this position is that the Commission has discretion, and exercises that discretion in the light of its expert judgment. Discretion is not, however, a substitute for substantial evidence and may only be exercised where there is something upon which to exercise it, to wit, substantial evidence.

We therefore urge the affirmance of the decree of the Court below, by which this Court will again proclaim approval of the interpretation of the words "public convenience and necessity" as they have been long interpreted by both the Interstate Commerce Commission and the Courts, including this highest court of our land.

Respectfully submitted,

SAMUEL WEISS.

SAMUEL WEISS,
Attorney for Plaintiff-Appellee,
Hudson Transit Lines, Inc.
535 Fifth Avenue,
Borough of Manhattan,
City of New York, New York,
and
JAMES F. X. O'BRIEN,
Attorney for and of Counsel with
Plaintiff-Appellee,
Hudson Transit Lines, Inc.
17 Academy Street,
Newark 2, New Jersey.

Dated: May 5, 1949.